No. 89-1867

Supreme Court, U.S.
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ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

STATE OF OREGON,

Petitioner,

v.

JEFFREY SCOTT WAGNER,
STEPHEN LEWIS FARRAR, and
REYES MIRANDA,

Respondents.

On Petition for a Writ of Certiorari to
the Supreme Court of the State of Oregon

RESPONSE IN OPPOSITION TO PETITION

SALLY L. AVERA
Public Defender
*STEPHEN J. WILLIAMS
Deputy Public Defender
603 Chemeketa Street NE
Salem, Oregon 97310
Telephone: (503) 378-3349

Counsel for Respondents

*Counsel of Record

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent accepts, as adequate for review, petitioner's reference to the opinions below, its jurisdictional statement, its statement of the constitutional and statutory provisions involved with the addition below, and the statement of the case with the addition of the facts set out below.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In 1989 the Oregon Legislature amended Oregon Revised Statute ORS 163.150. An additional relevant amendment is ORS 163.150(5), which provides:

> "(5) Notwithstanding paragraph (a) of subsection (l) of this section, the following shall apply:
>
> "(a) If a reviewing court finds prejudicial error in the sentencing proceeding only, the court may set aside the sentence of death and remand the case to the trial court. No error in the sentencing proceeding shall result in reversal of the defendant's conviction for aggravated murder. Upon remand and at the election of the state, the trial court shall either:
>
> "(A) Sentence the defendant to imprisonment for life in the custody of the Department of Corrections as provided in ORS 163.105(l)(c); or
>
> "(B) Impanel a new sentencing jury for the purpose of conducting a new sentencing proceeding.
>
> "(b) The new sentencing proceeding shall be governed by the provisions of subsections (l) and (2) of this section. A transcript of all testimony and all exhibits and other evidence properly admitted in the prior trial and sentencing proceeding shall be admissible in the new sentencing proceeding. Either party may recall any witness who testified at the prior trial or sentencing proceeding and may present additional relevant evidence.
>
> "(c) The provisions of this section are procedural and shall apply to any defendant sentenced to death after December 6, 1984."

REASONS FOR DENYING CERTIORARI

In these three capital cases the Oregon Supreme Court held that additional jury instructions or a "fourth question" must be given "if constitutionally required." *State v. Wagner*, 309 Or 5, 18, 786 P2d 93 (1980) (*Wagner II*). Thus, contrary to the state's assertion in its petition for certiorari, additional jury instructions will not be required in

all capital trials in Oregon. Furthermore, Oregon's newly amended capital sentencing statute explicitly limits the giving of a fourth sentencing question to cases in which it is constitutionally required. ORS 163.150(l)(b)(D).

The Oregon Supreme Court specifically held that it was construing the Oregon capital sentencing statute:

> "The first question before us is whether ORS 163.150 (1987 Replacement Part) (in effect for defendant's trial and later amended as of July 24, 1989) permits the trial judge to submit to the sentencing jury a so-called 'fourth question,' i.e., a query whether the death penalty is appropriate for this defendant, considering all aspects of his life and crime. This is strictly a matter of statutory interpretation." *Wagner II*, 309 Or at 7.

The court concluded that the statute did not preclude a "fourth question" or additional jury instructions in appropriate cases. In doing so the court discussed its prior opinion in *State v. Wagner*, 305 Or 115, 752 P2d 1136 (1988), *judgment vacated and remanded Wagner v. Oregon*, 492 US ___, 109 S Ct 3235, 106 L Ed2d 583 (1989) (*Wagner I*). The court adopted the suggestion by Justice Gillette in dissent in *Wagner I* that the statute could be construed to permit additional jury instructions. *See Wagner II*, 309 Or at 13-14. Most importantly, the court elected to adopt Justice Gillette's *policy decision* that the sentence of death should be reversed and the case remanded for a new sentencing hearing. The opinion in *Wagner II*, quoting Justice Gillette's dissent, states:

> "'It is true, as the majority doubtless recognizes, that to give the statute some construction such as the ones I have described probably would require that the sentence in this case be vacated and the matter be remanded for resentencing. That appears to me to be a small price to pay for establishing a set of statutory and constitutional directives to permit trial courts in the future to conduct constitutionally adequate sentencing proceedings that would avoid future case-by-case evaluations as to which piece of evidence satisfied which statutory and/or constitutional criteria. If the people of this state are to receive reliable enforcement of the death penalty, they deserve to have this aspect of the statutory scheme fully explored and its constitutional limitations declared now.' 305 Or at 232-33 (Gillette, J., dissenting). (Emphasis added.)
>
> "In view of what we have learned from *Penry*, it is now clear that mitigating evidence beyond the scope of the statutory issues is indeed constitutionally 'relevant to sentence' and, accordingly, statutorily admissible. *See State v. Wagner*, 305 Or at 156-67; ORS 163.150(l)(a). The step from the jury, suggested by Justice Gillette as a possibility of statutory construction in *Wagner* and required by the Supreme Court in *Penry* for a constitutionally valid death sentence, is the step we now take." 309 Or at 14 (fn. omitted).

The Oregon Supreme Court was obviously correct in concluding that the three statutory sentencing questions may not be adequate in all cases. This court so held in *Penry v. Lynaugh*, 492 US ___, 109 S Ct 2934, 106 L Ed2d 256 (1989).

The state court's decision to remand cases in which a fourth question or additional mitigating instructions were not available was made to "avoid future case-by-case evaluations as to which piece of evidence satisfied which statutory and/or constitutional criteria." *Wagner I*, 305 Or at 232-233 (Gillette, J., dissenting). That policy decision by the state court is not reviewable by this court. Any quarrel over that policy decision is between the voters of the State of Oregon and the elected members of the Oregon Supreme Court. The state court's decision to forgo case-by-case analysis of mitigating evidence in cases tried before this court's decision in *Penry v. Lynaugh* implicates no federal interests.

The Oregon Supreme Court did nothing more than remand these three cases to the state trial courts for initial determinations of whether additional instructions are required. The Oregon Supreme Court was required by statute to remand these cases for new penalty hearings. ORS 163.150(5) requires remand for a new penalty phase in any capital case in which the Supreme Court finds prejudicial error in the sentencing proceeding. The determination of prejudicial error and the interpretation of the state statute are matters of state law to be determined by the Oregon courts.

In these cases the Oregon Supreme Court found prejudicial error because the trial courts were precluded by the Supreme Court's earlier opinion in *Wagner I* from considering any arguments that additional sentencing questions on mitigating evidence were required.

The state is essentially asking this Court to undertake substantive sentence review in all Oregon capital cases in which the Oregon Supreme Court determines a defendant was prejudiced by error during sentencing. That is not a proper role for this court on a petition for certiorari from a state court's remand for resentencing on direct appeal.

This court can certainly rule that a sentence of death does or does not violate the United States Constitution. The importance of making such a ruling is obvious when the petitioner is an individual against whom such a sentence has been affirmed by a state

court. When as here, however, the petitioner is the state the importance of this court's determination of the correctness of the state court's ruling is much less, especially where the state court has upheld the constitutionality of the death penalty scheme itself and permitted the state a second opportunity to obtain a death sentence on remand. *See Delaware v. Van Aarsdall*, 475 US 673, 690, 89 L Ed2d 674, 106 S Ct 1431 (1986) (Stevens, J., dissenting); *Florida v. Burr*, 58 L W 3783 (June 11, 1990) (Stevens, J., dissenting).

Moreover, the Oregon sentencing statute at issue in these cases has been substantially amended since these trials. The amendments, which include the addition of a fourth sentencing question if constitutionally required, are specifically applicable to all cases that have arisen in Oregon since the enactment of the current death penalty law. ORS 163.150(5)(c). Thus, the Oregon Legislature has determined that the opportunity for additional jury instructions in death penalty cases is now the law in Oregon, and that law applies to these cases.

The Oregon Supreme Court in *Wagner II* discussed the new statute and suggested that trial courts use the Supreme Court's formulation of the fourth question. Oregon is in the process of clarifying its death penalty law to assure a uniform, constitutional application of capital punishment. Oregon should be allowed to proceed to apply the new amendments with the Oregon Supreme Court's guidance, where there is no evidence that the statute violates the federal constitution.

Indeed, the state itself has used the amended statute to decline to retry the sentencing phase of one of the seven cases the state criticizes the Oregon Supreme Court for remanding. Under ORS 163.150(5)(a)(A) the state has opted to have a life sentence imposed on the defendant in *State v. Moen*, 309 Or 45, 786 P2d 111 (1990) (Pet. for cert. p. 10).

Unlike other cases in which this court has granted state's petition for certiorari from a state appellate court's reversal on direct appeal, the Oregon Supreme Court's decisions in these cases do not deny the state the use of any evidence or the opportunity to obtain a death sentence. *See Oregon v. Elstad*, 470 US 298, 105 S Ct 1285, 84 L

Ed2d 222 (1985); *Michigan v. Long*, 463 US 1032, 103 S Ct 3469, 77 L Ed2d 1201 (1983).

The Oregon Supreme Court has simply ordered new sentencing proceedings in which these defendants will be afforded the opportunity to demonstrate that they are entitled to additional jury instructions that satisfy the federal constitution as provided in Oregon's current capital sentencing statute, ORS 163.150.

Any decision by this court in these cases would be advisory. The state's petition for certiorari nearly says as much:

> "The state seeks review, in part, because the Oregon Supreme Court's analysis fails to provide any assurance that the costly process of resentencing in all or even some of these cases is constitutionally required.
>
> "* * * Oregon seeks this Court's review so that it may know, before it conducts all future capital trials pursuant to the Oregon Supreme Court's new procedures, whether the eighth amendment compels the course the state court has charted." Pet. for cert. p. 10

This Court should refuse the state's invitation to undertake substantive sentence review of Oregon capital cases, where the State Supreme Court has decided that remand for new sentencing hearings will accord the people of Oregon "reliable enforcement of the death penalty." *Wagner II*, 309 Or at 14 (quoting *Wagner I*, Gillette, J., dissenting).

CONCLUSION

The petition for certiorari should be denied for the above reasons.

Respectfully submitted,

SALLY L. AVERA #77104
Public Defender
STEPHEN J. WILLIAMS #79443
Deputy Public Defender

Counsel for Petitioner

No. 89-1867

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

STATE OF OREGON,

Petitioner

v.

JEFFREY SCOTT WAGNER,
STEPHEN LEWIS FARRAR, and
REYES MIRANDA,

Respondents.

CERTIFICATE OF SERVICE: I certify that I am a member of the bar of the Supreme Court of the United States and that I served the Response in Opposition to Petition upon Ms. Virginia Linder, Solicitor General, attorney for petitioner by mailing copies thereof by first-class mail, postage prepaid, addressed to said attorney as shown below on June 21, 1990:

Ms. Virginia Linder
Solicitor General
Justice Building
Salem, OR 97310

All parties required to be served have been served.

Stephen J. Williams

STEPHEN J. WILLIAMS #79443
Deputy Public Defender
Counsel for Respondents